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No. 378

In the Supreme Court of the United States

OCTOBER TERM, 1932

JIMMIE BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 73-90) is reported in 59 F. (2d) 721.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 20, 1932. (R. 90-91.) The petition for certiorari was filed September 19, 1932, and was granted October 17, 1932. (R. 93.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether under the Federal Probation Act probation may be lawfully revoked only upon a preliminary notice to the probationer and a judicial trial of the specific charges upon which revocation is sought, and, if so, whether the petitioner was given adequate notice and hearing.

2. Whether probation may be revoked only upon a violation of a condition of the order of probation, and, if so, whether the evidence establishes that the petitioner violated a condition of his probation.

STATUTE INVOLVED

The Federal Probation Act is set forth in the Appendix, *infra*, pp. 34–36.

STATEMENT

The petitioner pleaded guilty (R. 17) to all three counts of a criminal indictment filed in the District Court for the Southern District of California (R. 3–8). He was sentenced on the first count to imprisonment for one year in the Los Angeles County jail, and on the second count to pay a fine of $2,000. On the third count he was sentenced to imprisonment for five years in the penitentiary, but the judgment provided that (R. 9–10)—

> execution of said sentence of imprisonment on the third count is suspended during such time as the defendant reports regularly every three months in writing, beginning with this date, to the Federal Probation Officer of this court, during which time he entirely refrains

> from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law abiding citizen. In case of the violation of the terms of probation, the defendant will be brought before the Court and sentenced. Probation is granted for a period of five years.

The judgment was entered May 4, 1931, and petitioner was on that day committed to the Los Angeles County jail to serve the one-year sentence. (R. 8, 12.) On January 21, 1932, he was brought before the court for a hearing on the question whether his probation on the third count should be revoked. The court ordered an hour's recess to enable petitioner to procure the services of an attorney. The hearing being resumed, counsel for petitioner stated that he did not know what the issues involved were and requested a continuance in order that he might have an opportunity to "inquire into the situation." (R. 19–21.) The request was denied, the court saying in part (R. 21–22):

> The newspapers for several days have been full of accounts reflecting, in a most serious measure and degree, upon this defendant who pleaded guilty to certain offenses, was given a jail sentence and also sentenced to a term in the Federal Penitentiary, which was suspended during the period of his good behavior. This is an extremely simple matter that the Court has before it. The question

> is whether he has violated the terms of his probation. The matter was brought to the attention of the Court by the United States attorney's office, whereupon the Court ordered that the defendant be brought before the court. We are here now to investigate. I don't feel that it is a matter in the nature of a trial, and, inasmuch as the matter has been brewing for several days, and the defendant himself might have anticipated such a proceeding, I see no harm in going ahead with the proceedings necessary to determine the question before the Court.

No exception was taken to this ruling of the court.

The Government called three witnesses. A. P. Rumburg, a special agent of the Bureau of Prohibition, testified that, having received information that petitioner was permitted to leave the county jail for a full day at a time, he had caused an investigation to be made of the jail records to ascertain the dates and length of petitioner's absences from the jail. A copy of the jail record thereupon produced by the witness was admitted in evidence as an exhibit. (R. 23–24.) It showed that on fifteen days between May 10 and August 18, 1931, inclusive, petitioner was absent from the jail for periods ranging from three hours and fifty-eight minutes to twelve hours and thirty-six minutes; that during these absences he was in the custody of one "Lessner," or one "Jones" (Deputy United States Marshals), and that the absences were au-

thorized by Judge James, a United States District Judge. (R. 24.) The witness further testified on direct and cross-examination that at his request one of the agents had talked to Judge James and had ascertained that the latter had in May granted authority for taking petitioner to the dentist; that the witness had interviewed Lessner, who exhibited to him an order authorizing petitioner to be taken to the dentist; that the order was a general one, but the witness could not say whether it was limited to a single visit or was for general treatment (R. 27–28); that on August 18, 1931, at 5.45 o'clock p. m., the witness telephoned petitioner's home and asked for Lessner; that petitioner answered the call and said that Lessner was there but was in the bathroom and could not come to the telephone; that the witness, accompanied by another agent, thereupon proceeded to petitioner's home, where they arrived at 6 o'clock p. m. and were admitted by petitioner, who was "without a coat or hat and had on bedroom slippers"; that petitioner told the agents that Lessner was in the bathroom and would be out shortly; that in about ten minutes Lessner entered, apparently through a back door, with his hat and coat on, bringing "a couple of packages of cigarettes" (R. 25–26, 29–30); that the agents were there until 6.20 o'clock p. m. (R. 25) and left before petitioner and Lessner (R. 28).

After cross-examination of the witness had proceeded at some length it was interrupted by the trial judge, who personally conducted an examina-

tion of the witness. At the conclusion thereof the judge refused to permit further cross-examination, saying, "We are not conducting a trial." An exception to this action of the court was noted. (R. 30.)

R. S. Zimmerman, clerk of the court, testified that in the usual course of procedure the granting of authority for the release of a prisoner from the county jail would be noted on his records, but that his records failed to disclose that any such authority had been granted as to petitioner.[1] (R. 30–31.)

Taking the stand in his own behalf, petitioner, upon cross-examination, gave the following testimony (R. 44–45, 47–48):

> Q. By Mr. REDWINE. Now, the record shows on May 30th—you left the jail on May 30th, at 10 o'clock A. M. and did not return until 9.06 P. M. You were not in his office all of that time?
>
> A. No, sir; I don't remember the incident, but I don't suppose I was.
>
> Q. What did you do?
>
> A. Well, I might have had something to eat.
>
> Q. What else did you do?
>
> A. That is all.

---

[1] Considerable testimony also appears in the record with reference to the alleged obtaining by petitioner from a fellow prisoner of a false statement contradicting a prior statement that the latter had given in connection with a certain kidnapping case (R. 32–40), but as this testimony was not made the basis for revoking probation it is not here discussed (R. 49).

Q. Well, what were you doing until 9.06 P. M. in the evening?

A. Well, listening to the radio; something like that.

Q. Where were you listening to the radio?

A. At my home.

Q. How many times did you go to your home when you were really supposed to be going to the dentist?

A. Well, I really couldn't tell you; just quite a few times.

Q. Most of the time?

A. Pretty near.

* * * * *

Q. When you left the jail and didn't go to the dentist's office were you and Lessner riding around or were you at your house and would Lessner ride around, is that right?

A. Yes.

On redirect examination petitioner stated that when he was out of the jail he asked to be taken home to get a change of clothes; that "usually each time he went to the house he went for a change of linen." (R. 48.)

At the conclusion of petitioner's testimony his counsel requested an opportunity to present further evidence. The request was denied, the court saying, "I am not prepared to have a hearing of this case that will run into the proportions of a criminal trial." (R. 48–49.) In rendering its de-

cision, to which an exception was taken, the court stated, in part (R. 49):

> Now, gentlemen, there is enough obviously before this court to show that the spirit of the probation was not in any sense complied with. The idea that one person sentenced to the county jail should over a period of 3 months, a little bit more than 3 months, be taken out for on 15 different occasions from 10 o'clock in the morning until 9 o'clock at night, oftentimes, that of itself is something that should bring the blush of shame to anybody entrusted with the execution of the law.

Upon appeal the order of the District Court was affirmed. (R. 90–91.) This Court granted a writ of certiorari. (R. 93.)

SUMMARY OF ARGUMENT

I

The notice and hearing accorded the petitioner were adequate. Both the language of the Federal Probation Act and its legislative history disclose the intent of Congress that the granting and revocation of probation should rest in the discretion of the District Judge, and the Federal courts have uniformly held that wide latitude must be permitted in the administration of the Act. The District Judge is expressly given the power, without limitation, to revoke or modify any condition of probation and to revoke the probation itself. The statute does not expressly require any notice to be given the probationer or any hearing upon the charges upon which

revocation is sought. The absence of limitations upon the court's power to revoke probation and the failure to prescribe any procedure to be followed indicate that the court may determine for itself the method by which it ascertains the relevant facts and arrives at its conclusions.

Probation is not a contract, giving rise to vested rights, but a matter of grace. The privilege is extended only when the District Judge is satisfied "that the ends of justice and the best interests of the public" will be served. When it becomes manifest to the District Judge, by any form of proceeding which enables him fairly to determine whether or not the object of the probation has failed, the probation may be revoked.

If anything, the petitioner was accorded greater, rather than less, consideration than would have been necessary under the statute. While the advance notice given him of the proposed revocation of his probation was short, he was permitted to engage counsel who represented him at the hearing, to cross-examine the Government witnesses to a certain extent, and to testify in his own behalf. Although he was not furnished with a written specification, it is clear that he knew he was charged with being improperly outside the prison to which he had been sentenced, and his own testimony established the truth of this charge. Accordingly, it was not an abuse of discretion for the District Judge to refuse to allow the petitioner to introduce

further evidence since he had himself admitted repeated absences from the jail.

II

The petitioner's probation was revoked upon sufficient cause. The statute does not impliedly contemplate, as petitioner asserts, that probation may be revoked only upon a violation by the probationer of some condition of the probation. Such a limitation is not expressed in the statute, and it may not be implied in view of the District Judge's power to revoke *after the period of probation,* and therefore at a time when the conditions of the probation are no longer in effect. Probation, being granted only when the District Judge is satisfied that the ends of justice and the best interests of the public will be served, may be revoked whenever it appears to his satisfaction that the purpose of the privilege has failed.

Moreover, the petitioner violated the conditions of his probation, which were that he refrain "from any violation of law" and conduct himself "as a law abiding citizen." The requirement that he should conduct himself "as a law abiding citizen" was essentially one of good conduct. That the petitioner failed to meet this requirement is manifest from his flagrant abuse of the privilege granted him of being taken to the dentist for treatment.

Even if the conditions of the order of probation be interpreted as referring only to violations of law,

there was a breach of the conditions. By conniving with his custodians to abuse the limited privilege conferred upon him, the petitioner, if not guilty of a contempt of court for flouting the mandate of commitment, was guilty of a conspiracy to commit a contempt of court. Moreover, by taking a greater liberty than that to which he was entitled under the order, he was, if not guilty of an escape, guilty of conspiring with his custodians to commit a violation of Section 138 of the Criminal Code, which covers the offense of permitting prisoners to escape.

ARGUMENT

I

THE NOTICE AND HEARING ACCORDED THE PETITIONER WERE ADEQUATE

The petitioner, assimilating the revocation of probation to a criminal trial, contends that probation may not be revoked without a "judicial hearing" in accordance with "established rules of judicial procedure."[2] He defines the requisite hearing as including (Pet. 8)—

[2] The petitioner's right to a notice of the charges upon which revocation of his probation was sought and a period in which to prepare his defense was originally raised by a motion for a continuance. (R. 20–21.) This motion was denied, but no exception was taken to the action of the court. (R. 22.) While this Court may disregard the lack of an exception in a criminal case where manifest injustice would result, this is not such a case. The petitioner by his own statements is guilty of a flagrant abuse of the limited privilege extended to him as a prisoner.

> notice of the specific charge, a reasonable opportunity to prepare his defense, a reasonable opportunity of cross-examination, and a reasonable opportunity to call witnesses in his own behalf.

The Government contends that no set or standardized procedure is required for the revocation of probation; that, at least so long as the District Judge does not act arbitrarily, probation may be revoked summarily and without the formal requisites of a trial; and that the notice and hearing given the petitioner were adequate.

The power of the Federal courts with respect to the granting and revocation of probation exists only as granted by the Federal Probation Act. See *United States* v. *Murray*, 275 U. S. 347, 354. Section 1 of that Act (p. 34, *infra*) provides that the courts of the United States having original jurisdiction of a criminal action shall have the power—

> when it shall appear *to the satisfaction of the court* that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, * * * to suspend the imposition or execution of sentence and to place the defendant upon probation *for such period and upon such terms and conditions as they may deem best;* * * *. (Italics ours.)

Section 1 provides further that—

> The court may revoke or modify any condition of probation, or may change the period of probation.

Section 2 provides that the probation officer, when directed by the court, shall report to the court as to the conduct of the probationer, whereupon the court may take such action "as shall seem advisable." Section 2 further provides that—

> At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

The language of the statute and its legislative history clearly disclose the intent of Congress that the granting and revocation of probation should rest within the discretion of the trial judge, and the Federal courts have uniformly held that wide latitude must necessarily be permitted to the trial judge in the administration of the statute. *Riggs* v. *United States,* 14 F. (2d) 5, 9 (C. C. A. 4th), certiorari denied, 273 U. S. 719; *Jianole* v. *United States,* 58 F. (2d) 115 (C. C. A. 8th); *Reeves* v. *United States,* 35 F. (2d) 323, 325 (C. C. A. 8th); *Campbell* v. *Aderhold,* 36 F. (2d) 366, 367 (N. D.

Ga.). See House Rept. No. 423, 68th Cong., 1st Sess.; Hearings of February 21, 1924, before a subcommittee of the Senate Judiciary Committee on S. 1042 and S. 1729, 68th Cong., 1st Sess., pp. 19, 22, 23.

The statute places no conditions or limitations upon the power of the District Judge to revoke probation except as to the time within which he must act. It does not expressly require any preliminary notice to the probationer, either written or oral, of the charges upon which revocation of probation is sought, nor does it expressly provide for any hearing, formal or otherwise, upon such charges. On the contrary, Section 2 provides that upon the arrest of the probationer he shall *forthwith* be taken before the court, and that *thereupon* the court may revoke the probation. When Section 2, requiring that the probationer be summarily arrested and brought before the court, is read with the provision of Section 1 that "The court may revoke or modify any condition of probation," it seems clear that notice is not required and that if any be given, the character of the notice and the nature of the hearing are matters within the sound discretion of the District Judge. The lack of any limitation upon the power to revoke probation and the failure to define any procedure to be followed disclose the statutory purpose that the trial court shall upon such inquiry as it deems adequate proceed in such manner as it deems proper to revoke the probation.

This conclusion is consistent with the theory and the purpose of the statute. Probation is not a vested right but is a matter of grace, and the revocation thereof is merely a withdrawal of the privilege extended at the time the defendant is arraigned for sentence. When the imposition or the execution of a sentence is suspended, the sentence is not vacated nor is the judgment impaired. The convicted person is not freed from the legal consequences of his guilt, but is merely enjoying a conditional favor, contingently postponing his punishment, which may be withdrawn. When he is brought before the court upon the charge that he has violated his probation, he is not charged with a new crime, for which he is subject to a new punishment, and accordingly the revocation of probation is in no sense a trial. It is a proceeding with respect to the sentence and in the absence of express provisions should be subject to no procedural limitation which would not apply when sentence is imposed. The imprisonment which follows the revocation of probation is not punishment for violation of the probation, but for the commission of the offense of which the probationer stands convicted. See *Kaplan* v. *Hecht,* 24 F. (2d) 664, 665 (C. C. A. 2d); *Kennedy's Case,* 135 Mass. 48, 52; *Commonwealth* v. *McGovern,* 183 Mass. 238, 240; *Finer* v. *Commonwealth,* 250 Mass. 493, 496; *Richardson* v. *Commonwealth,* 131 Va. 802, 810; *Fuller* v. *State,*

122 Ala. 32, 38–39; *In re Patterson,* 94 Kan. 439, 442; *People* v. *Sapienzo,* 60 Cal. App. 626.

The theory of probation is that by suspending the sentence or its execution the convict is given an opportunity for reformation if the court is satisfied "that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby." See *United States* v. *Murray,* 275 U. S. 347. In granting probation the judge acts upon his knowledge of the character and situation of the convict, and often upon expressions of penitence and promises to reform. No formal hearing is then necessary and the defendant may not call or examine witnesses. The court may make such inquiries and be guided by any information *dehors* the record it considers pertinent. There is nothing in the statute requiring any different procedure when probation is revoked. *People ex rel. Woodin* v. *Ottaway,* 247 N. Y. 493, 497.

Without an extended hearing the judge should determine summarily and at any time whether the probationer continues worthy of the privilege extended. Knowledge by the convict that the favor he enjoys may be withdrawn by the court at any time imposes a moral restraint which must be exercised if the interest of the public is to be served as the statute contemplates. The force and virtue of the plan lies in the power reserved to speedily revoke the privilege and inflict the penalty imposed by law. (See House Rept. No. 423, 68th Cong., 1st Sess., p. 2.) If this power is hedged about with

procedural restrictions which delay its exercise while lawyers contend in court and appeals delay the execution of sentence, the purpose of the statute is defeated. Accordingly, the trial courts must necessarily have a large discretion not only in extending probation, but in its revocation. Unless courts are given broad power in the matter of revocation, greater caution will be exercised in extending probation, with the result that the benefits of the statute will be greatly restricted. See *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.), *supra*.

Except possibly for certain *dicta* of one Circuit Court of Appeals, these conclusions are supported by the decisions of the Federal courts. In *United States* v. *Mulligan*, 48 F. (2d) 93 (C. C. A. 2d) the court, construing the Federal Probation Act, said (p. 94):

> The act itself has no express restrictions on the power to revoke the probation or to modify the terms, conditions, or time thereof. These are matters for the exercise of a sound judicial discretion.

In *Jianole* v. *United States*, 58 F. (2d) 115 (C. C. A. 8th), it was contended that probation could not be revoked without the filing of a verified information stating specifically the grounds upon which revocation was sought. It appears that when the probationer was brought before the trial court she raised the objection that she had not received sufficient notice of the charges against her to enable her properly to answer them. The court thereupon

required the probation officer to state the time and place of the alleged violations of probation, whereupon Government witnesses testified as to these transactions. At the close of the Government's evidence the probationer was given a continuance in which to secure evidence in opposition, which was thereafter submitted. In holding that no error had been committed by the District Judge, the court said (p. 117):

> The statute provides no formalities for the revocation of probation. On the contrary, the very language of the act discloses the purpose of Congress that the courts should deal with the subject, *not arbitrarily, but promptly and summarily.* * * * Everything points to the purpose of the Congress to lodge a very broad discretion in the trial judge in the granting and revoking of probation. *To require formal proceedings would be subversive of the very purpose of the act.* (Italics ours.)

In *Campbell* v. *Aderhold,* 36 F. (2d) 366 (N. D. Ga.), *supra,* the contention was made that probation could not be revoked for conduct alleged to be a crime until conviction for it. In denying this contention the court said (p. 367):

> Probation is wholly discretionary and of grace, and not at all a right. It is in no sense a bargain. If the judge becomes satisfied that the probation is a failure and the best interests of the public and the defendant are not being subserved, and that differ-

ent treatment is required, he has the right and the duty to terminate the experiment and let the law take its original course.

If probation is an act of grace which may be revoked summarily, though not arbitrarily, by the District Judge, the probationer's contention that he should have been accorded a hearing substantially in the nature of a criminal trial is clearly unfounded.

But even if the statute be interpreted to require some notice and hearing, we submit that the procedure followed in the case at bar met all the requirements of the statute. While the advance notice of the proposed revocation was short, the hearing was postponed long enough for the petitioner to engage counsel to represent him at the hearing. He was permitted to cross-examine the Government witnesses to a certain extent, and in addition testified in his own behalf. While he was not furnished with a written specification of the precise charge against him, it is clear that he knew he was charged with being improperly outside of the prison to which he had been sentenced, and *in his own testimony he admitted the truth of this charge.* (R. 44–45.) Under these circumstances it was not an abuse of discretion for the District Judge to refuse to allow the petitioner to introduce further evidence. Having admitted the truth of the charge upon which probation was revoked, the petitioner could not have been prejudiced by the

failure to advise him formally of the charge or by the failure to permit him to introduce evidence.[3]

The petitioner relies upon *Hollandsworth* v. *United States,* 34 F. (2d) 423 (C. C. A. 4th). The only question there involved. so far as the instant case is concerned, was whether the failure by the District Judge to include in the written order of probation the oral conditions upon which he granted probation nullified the probation, and, therefore, prevented revocation thereof. The court, sustaining the revocation of probation, said (p. 428):

> It follows that, whenever it is charged that a probationer has failed to follow the instructions of the court, he may not be sentenced until he has been given notice of the specific charge and an opportunity to be heard in his defense, and until the court, upon hear-

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[3] Petitioner asserts that the evidence which he was not allowed to introduce would have established (Pet. Br. 8): "* * * considerable time spent on each occasion at the dentist's office; that the deputy marshals had numerous official papers to serve daily and did serve and discharge their official duties in transit to and from the dentist's office, and that at all times and in all respects the petitioner was under the direction of the said United States Marshals and did not act as a free-will agent during his absences from jail."

None of this evidence, part of which is inconsistent with petitioner's own testimony, would have contradicted the truth of the charge that he was "riding around" and improperly enjoying the comforts of his home when he should have been in jail or at the dentist's office.

> ing, shall have judicially determined that his conduct during the probation period has not conformed to the course outlined in the order of probation.

Although this statement is *dictum,* since there were no questions in the case as to notice or hearing and the sentence imposed upon revocation of probation was affirmed, it is not inconsistent with the decision in the case at bar. For reasons stated, the petitioner was accorded an adequate notice and a sufficient opportunity to be heard.[4]

The State decisions dealing with the revocation of probation are not wholly in accord. While many apparent inconsistencies are explained by variations in the applicable statutes, there is at least one case which holds, under a statute fairly comparable to the Federal statute, and under facts somewhat similar to those in the instant case, that the probationer, although not entitled to a trial by jury, is entitled to a judicial hearing otherwise in the nature of a criminal trial. *State* v. *Zolan-*

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[4] In *Riggs* v. *United States*, 14 F (2d.) 5 (C. C. A. 4th), the court said (p. 9):

"It is not necessary that we pass upon the defendant's contention that he was entitled to a hearing upon the question of the breach of the terms of his probation, for it affirmatively appears of record that at the time of the revocation of the probation and imposition of sentence he was present in his own proper person, and the government made it appear by evidence satisfactory to the court that the conditions of the probation had been violated, and no exception appears to have been taken to such action of the court."

takis, 70 Utah, 296.[5] This decision appears to be in conflict with the great weight of authority, which holds that probation, being a matter of grace and not a vested right, may be revoked summarily without a formal trial, that the matter of procedure is one which rests in the discretion of the court, and that neither notice to the probationer nor a trial of the issues of fact is required if under all the circumstances of the particular case the judge has not acted arbitrarily.[6] *People* v. *Dudley,* 173 Mich. 389, 395; *State* v. *Sullivan,* 127 S. C. 186; *State* v. *Miller,* 122 S. C. 468, 473–475; *People ex rel. Woodin* v. *Ottaway,* 247 N. Y. 493, 497, *supra; People* v. *Trombly,* 173 App. Div. 497; *People* v. *Goodrich,* 149 N. Y. Supp. 406; *People* v. *O'Donnell,* 37 Cal. App. 192; *People* v. *Sapienzo,* 60 Cal.

[5] It has been held under statutes not altogether like the Federal statute that probation may not be revoked without the probationer having been arrested and brought before the court as required by the statute, and without notice or hearing of any kind. *Plunkett* v. *Miller,* 161 Ga. 466; *State* v. *O'Neal,* 147 Wash. 169. The same conclusion has been reached where no statute was involved. *Ex Parte Lucero,* 23 N. M. 433. Such cases are clearly inapplicable to the case at bar.

[6] Of course no hearing is required where the statute expressly provides for revocation of probation without notice. *State* v. *Chandler,* 158 Minn., 447; *In re Patterson,* 94 Kan. 439. Cf. *State* v. *Stair,* 48 N. D. 472, 476, which involved a statute providing for termination of probation only "after a full investigation and personal hearing," and *Williams* v. *State,* 162 Ga. 327, 334–335, where the court discussed a statute which permitted revocation only after "due examination."

App. 626; *People* v. *Sanders,* 64 Cal. App. 1.[7] See also *Owen* v. *Smith,* 89 Nebr. 596; *Kennedy's Case,* 135 Mass. 48, 54; *Fuller* v. *State,* 122 Ala. 32, 40. Cf. *Sylvester* v. *State,* 65 N. H. 193.

Of the State decisions those of New York and Massachusetts are of chief importance in the case at bar. The Federal Probation Act was based largely upon the New York and Massachusetts probation statutes (House Rept. No. 423, 68th Cong., 1st Sess., p. 4), and, under well-established principles Congress must be deemed to have adopted the construction placed upon the New York and Massachusetts statutes by the courts of those States.

In construing the New York statutes, the New York Court of Appeals in *People ex rel. Woodin* v. *Ottaway, supra,* said:

> The power to stay execution, like the power to revoke the stay, or to place a defendant on probation, is confided to the court of original jurisdiction, which may be controlled in the exercise of its discretion by information *dehors* the record.

Thus, the revocation of the stay of execution was regarded as requiring no different procedure than that which is followed when sentence is imposed,

[7] Under the California statute (Penal Code, Sec. 1203), which is closely similar to the Federal statute, it is not necessary that the probationer be notified of the motion to revoke his probation, and probation may be revoked even if he is absent from the court at the time. *People* v. *O'Donnell,* 37 Cal. App. 192, *supra; People* v. *Sapienzo,* 60 Cal. App. 626, *supra.*

and it was recognized that the discretion to revoke might be influenced by information entirely outside the record, and was therefore not subject to review.

In Massachusetts the power to revoke probation is discretionary and is imposed in the trial court. *Commonwealth* v. *McGovern,* 183 Mass. 238.

II

THE PETITIONER'S PROBATION WAS REVOKED UPON SUFFICIENT CAUSE

The petitioner contends that his probation could be revoked only upon a showing that he had violated a condition of his probation; that to show a violation of his probation it was necessary to establish that he had violated a law; that the evidence does not establish that he had violated any law; and that therefore his probation was unlawfully revoked. The Government disputes the three premises upon which this conclusion rests.

In *Hollandsworth* v. *United States,* 34 F. (2d) 423 (C. C. A. 4th), *supra,* relied upon by the petitioner, the court said (p. 428):

> The power of the court to revoke a probation and sentence the probationer may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him.

This statement was based upon the provision in Section 4 of the Federal Probation Act (p. 35, *infra*) which requires the probation officer to fur-

nish to each person released on probation "a written statement of the conditions of probation" and to "instruct him regarding the same." See also the concurring opinion in *Riggs* v. *United States,* 14 F. (2d) 5, 10, *supra; State* v. *Zolantakis,* 70 Utah, 296, 303, *supra.*[8]

The statement of the court in the *Hollandsworth* case finds some slight support in Section 4, but consideration of the statute as a whole in our belief, shows it to be erroneous. As previously stated, the statute places no express limitations upon the power of the District Judge to revoke probation. Nor is it expressly provided that probation may be revoked only upon the violation of a condition of the probation. The power given the District Judge under Section 1 at any time to revoke or modify any condition of probation or to change the period of probation shows that it was not the purpose of Congress to confer a vested right upon probationers to remain on probation under the terms and conditions originally prescribed, and seems to negative the claim that revocation is possible only if a condition has been vio-

[8] Various State decisions construing statutes which are not wholly comparable to the Federal statute have enunciated somewhat similar rulings. See *State* v. *Stair,* 48 N. D. 472, 476; *Williams* v. *State,* 162 Ga. 327; *State* v. *Miller,* 122 S. C. 468, 475. Similar statements have been made with respect to the court's power at common law to revoke a suspended sentence. *State* v. *Phillips,* 185 N. C. 614; *State* v. *Hardin,* 183 N. C. 815; *Ex Parte Lucero,* 23 N. M. 433; *Weber* v. *State,* 58 Oh. St. 616, 619.

lated. Moreover, the authority conferred upon the District Judge by Section 2 (*infra,* p. 35) to revoke probation *after the period of probation,* and therefore at a time when the conditions of the probation are no longer in effect, is not consistent with the view that revocation may be ordered only for a violation of such conditions. The statute thus appears to contemplate that the whole matter of the revocation, as well as the granting, of probation should rest, as does the question of sentence, in the sound discretion of the District Judge. (See pp. 15–22, *supra.*)

It is only by viewing probation as a contract, giving rise to legal rights which the convict may enforce against the court which granted the probation, that the statute may be interpreted as making revocation dependent upon a violation of some condition of the probation. Obviously probation is not a contract or bargain. *Jianole* v. *United States,* 58 F. (2d) 115, 117 (C. C. A. 8th), *supra; Campbell* v. *Aderhold,* 36 F. (2d) 366, 367 (N. D. Ga.), *supra; Richardson* v. *Commonwealth,* 131 Va. 802, 810, *supra.* See *In re Patterson,* 94 Kan. 439, 442, *supra.* And the failure to insert proper conditions, or any condition at all, in the order of probation, has no effect upon the court's power to terminate it. *United States* v. *Mulligan,* 48 F. (2d) 93 (C. C. A. 2d), *supra; People* v. *Trombly,* 173 App. Div. 497, *supra; Commonwealth* v. *McGovern,* 183 Mass. 238, *supra.* See *Archer* v. *Snook,* 10 F. (2d) 567, 568 (N. D. Ga.).

We believe that the provisions of the statute relating to "a written statement of the conditions of probation" were intended for the benefit and guidance of the convict and not as a limitation upon the power of revocation. While the conditions so prescribed must be observed, and while revocation may be had for their violation, the court should not be limited by these conditions but should be free to revoke probation for acts equally as reprehensible as those expressly forbidden in the order.[9]

The District Judge can not foresee all the contingencies that may arise from the future conduct of the probationer which may affect "the ends of justice and the best interests of the public." If the District Judge's power to revoke is limited to the express terms of the order, so that the Government takes the risk of any loose language, it will result that probation orders will be burdened with unnecessary detail, courts will hesitate to grant probation where it would otherwise be extended, appeals will be taken to delay the revocation, and the purpose of the statute will be defeated.

In *United States* v. *Mulligan,* 48 F. (2d) 93 (C. C. A. 2d), *supra,* a habeas corpus proceeding, it was contended that the power to revoke proba-

[9] The necessity for stringent supervision of criminals placed upon probation has been commented upon by the courts (*Finer* v. *Commonwealth*, 250 Mass. 493, 497) and was prominently in the minds of those who were influential in securing the enactment of the Federal Probation Act. See House Rept. No. 423, 68th Cong., 1st Sess., p. 5.

tion was dependent upon allegation and proof that some condition expressed in the probation order had been violated. With regard to this contention, the court said (p. 94):

> However desirable it may be that at least the general terms of the probation be expressed in the order, nevertheless, in the absence of a statutory requirement and in view of the fact that the suspension of sentence may continue even after the probation period is ended, we can not deem the insertion of the terms and conditions of probation in the order as requisite to its validity or as a jurisdictional prerequisite to the revocation of probation.

We submit that the correct interpretation of the statute is that given it by the court below (R. 87):

> The whole theory of probation is that of giving to the convicted person an opportunity for reformation, and when it is manifest that the probationer is not taking advantage of the opportunity given him probation should be revoked and the appropriate sentence for the crime theretofore committed should be imposed or executed. When that point has arrived in the history of the probationer where it is sufficiently manifest to the judge that the object of probation has failed, there is no reason why probation should not be revoked.

See also cases cited at pp. 15, 17–18, *supra*.

Moreover, in the instant case there was a breach of the conditions upon which probation was granted. These conditions were that the petitioner (R. 9–10)—

> * * * entirely refrains from any violation of any law with the possible exception of parking and traffic ordinances, and in all respects conduct himself as a law abiding citizen.

Bearing in mind the fact that the first year of the probationary period was to be spent in jail, we submit that the petitioner did not conduct himself as "a law abiding citizen" when the evidence shows that in disregard of his commitment and in abuse of the obvious intent of an order permitting him to be taken to the dentist for treatment, he remained away from the jail on fifteen occasions during a three months' interval for periods ranging from four to twelve and a half hours, most of which time apparently was spent not with the dentist but in riding around and in enjoying the comforts of his home.

The petitioner contends that the conditions of his probation were not breached because he violated no law. In other words, he asserts that the condition that he should conduct himself "as a law abiding citizen" has the same meaning as the preceding condition in the probation order that he should refrain "from any violation of any law." As applied to a man who was to spend the first year of his probationary period in jail, we do not believe

that such a construction of the probationary order is sound. The requirement that the petitioner should "in all respects conduct himself as a law abiding citizen" was essentially one of good conduct. Prisoners have little opportunity to violate criminal laws, and in the light of this fact it seems clear that the District Judge, as indicated at the hearing on the revocation of probation (R. 21, 49), intended by the order of probation that sentence should be suspended only so long as the petitioner's behavior was good.[10] If the condition in question has the broader meaning which the District Judge evidently intended it to have, there was clearly a breach of it, for, as was said by the court below (R. 84), the petitioner "had taken advantage of a general permit to carry out his own purposes quite independently of the basis and theory upon which the order was given." His conduct was not consistent with any reasonable conception of the idea of good behavior, even for one in jail.

But even if the condition be given the stricter interpretation asserted by petitioner, we submit that there was a breach of it. Petitioner's abuse of the

[10] We do not think it goes too far to say that good conduct is an essential condition of every probation, whether expressly stated or not. This, indeed, would seem to be implied by the very meaning of the term. A declared aim of the statute was to encourage "industrious, law-abiding habits" by the creation of an "effective disciplinary system." See House Rept. No. 423, 68th Cong., 1st Sess., p. 2; Hearings of February 21, 1924, before a subcommittee of the Senate Judiciary Committee on S. 1042 and S. 1729, 68th Cong., 1st Sess., p. 14.

limited privilege conferred upon him of going to the dentist for treatment could not have occurred without the connivance of those who were charged with his custody. These officers could have been punished for contempt of court in disregarding the manifest intent of the order of commitment. If the petitioner was not equally guilty of contempt he was clearly a party to the flouting of the mandate of the commitment by the officers. In *United States* v. *Hoffman,* 13 F. (2d) 269, 272, affirmed, 13 F. (2d) 278, 280 (C. C. A. 7th), the court held under similar circumstances that the prisoner could be charged with conspiring with his custodians to commit a violation of Section 268 of the Judicial Code (U. S. C., Title 28, Sec. 385), which provides for the punishment of contempts of court. See also *In re O'Rourke,* 251 Fed. 768 (Mont.); *Ex Parte Shores,* 195 Fed. 627 (N. D. Iowa). The record shows active cooperation by at least one of the petitioner's custodians in the abuse by petitioner of the limited privilege accorded him to visit the dentist. (R. 25–26.)

The petitioner violated the law in other respects. The authority granted to him to visit the dentist obviously did not permit him to "ride around" and to visit and enjoy the comforts of his home for substantial periods, whether in or out of the custody of his guards at the time. By taking without warrant a greater liberty than he was entitled to under the order the petitioner under the common law rule

was guilty of an escape, so that while he was "riding around" and in his home, when he was supposed to be at the dentist's office, his status was that of an escaped prisoner. See *In re O'Rourke,* 251 Fed. 768 (Mont.); *Steere* v. *Field,* Fed. Cas. No. 13350 (R. I.), p. 1221; *Hobert's Case,* Cro. Car. 209; *Benton* v. *Sutton,* 1 Bos. & Pul. 24; *Riley* v. *State,* 16 Conn. 47, 51; *Hefler* v. *Hunt,* 120 Me. 10, 13; *In re Rigg,* 95 N. J. Eq. 341; *Colby* v. *Sampson,* 5 Mass. 310, 311. Cf. *Whitaker* v. *Commonwealth,* 188 Ky. 95, 97; *Wiggins* v. *State,* 194 Ind. 118, 120–121. Even if the rule of these cases is not applicable in the Federal courts,[11] the evidence seems clearly to establish that his custodians were guilty of a violation of Section 138 of the Criminal Code, which covers the offense of permitting prisoners to escape (*Ex Parte Shores,* 195 Fed. 627, 630 (N. D. Iowa); *Zimmerman* v. *United States,* 1 F. (2d) 712 (C. C. A. 6th); *In re O'Rourke,* 251 Fed. 768 (Mont.), *supra*), and that the petitioner, by his own testimony, was a party to a conspiracy to violate Section 138 (*United States* v. *Hoffman,* 13 F. (2d) 269,

[11] The Circuit Court of Appeals said (R. 84) that—

"The order of revocation was not based upon a technical escape but upon the fact that the appellant had not acted in good faith in carrying out the order of the trial Judge, * * *."

This statement does not appear to be a holding by the court below that the facts did not establish an escape, but merely comment upon the trial Judge's reasons for revoking the probation. Under the view of the statute held by the court below (R. 86–88) it was immaterial whether or not the petitioner had violated any law.

272, *supra; Ex Parte Lyman,* 202 Fed. 303 (W. D. Wash.)).

It thus seems clear that petitioner was guilty of a breach either of the condition that he should refrain "from any violation of any law" or that he should "in all respects conduct himself as a law abiding citizen."[12] The probation was therefore properly revoked under the interpretation of the statute enunciated in the *Hollandsworth case* as well as under that adopted by the court below.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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[12] Where revocation is sought upon the ground that the probationer has committed an offense, it is not necessary that the probationer be convicted, but only that the proof shall be such as to satisfy the District Judge that the offense has been committed. *Jianole* v. *United States*, 58 F. (2d) 115 (C. C. A. 8th), *supra; United States* v. *Bishop*, 47 F. (2d) 95, 97 (C. C. A. 5th).

APPENDIX

STATUTE INVOLVED

The Probation Act of March 4, 1925, c. 521, 43 Stat. 1259, 1260 (U. S. C., Title 18, Secs. 724–727), provides, in part, as follows:

> That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided,* That the period of probation, together with any extension thereof, shall not exceed five years.
>
> While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss

caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. That when directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer without a warrant, or the court may issue a warrant for his arrest. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

Section 3 provides for the appointment of probation officers.

SEC. 4. That it shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation

under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such reports to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. A probation officer shall have the power of arrest that is now exercised by a deputy marshal.

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